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ABSTRACT

This paper contains an analysis of case law as it relates to the scope of bargainable issues and its possible impact on public two-year postsecondary institutions in Pennsylvania. Pennsylvania's Public Employee Relations Act defines three categories of collective bargaining issues: (1) mandatory subjects of negotiation, (2) permissive issues of management rights, and (3) illegal provisions in violation of state statute or municipal home rule charters. Although the enabling legislation has been in existence only since 1970, a succession of court cases (both state and federal), rulings by the National Labor Relations Board and the Pennsylvania Labor Relations Board, and arbitration cases, have led to its legal interpretation. While mandatory and prohibited issues have been well defined, no state court cases have been decided at the highest level regarding permissive issues. A review of the ten existing Pennsylvania collective bargaining agreements reveals that a great many permissive issues involving educational policy and governance have been bargained. Whether the colleges knew these issues could have been avoided entirely cannot be ascertained. Permissive issues must be carefully delineated by the colleges and specified at the bargaining table. They should not be negotiated without reciprocal consessions secured from the collective bargaining unit. (JDS)

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SCOPE OF COLLECTIVE BARGAINING IN PENNSYLVANIA COMMUNITY COLLEGES

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SCOPE OF COLLECTIVE BARGAINING IN PENNSYLVANIA COMMUNITY COLLEGES

Of fourteen community colleges in the Commonwealth of Pennsylvania eleven have organized for the purpose of collective bargaining under Pennsylvania's Public Employe Relations Act (Act 195). Five of the eleven recognize a local of the American Federation of Teachers as the bargaining agent while the others are represented by an affiliate of the National Educational Association. All have concluded agreements except one where initial contract talks are proceeding.

In order to consider in context the range of issues included in current community college contracts and prepare guidelines and caveats for future negotiation sessions, it is necessary to understand the collective bargaining legislation in Pennsylvania. This paper, then, is an analysis of case law as it relates to the scope of bargainable issues and its possible impact on public two-year post-secondary institutions in Pennsylvania.

The history of Pennsylvania's collective bargaining legislation for public employees is sufficiently short to cause considerable confusion and at times consternation on the part of employees and employers as to what must, what may, and what may not be discussed at the negotiating table and included in contracts for eventual interpretation by arbitors, the Pennsylvania Labor Relations Board (PLRB), and the courts. Primary source documents of invaluable assistance for this analysis include the Public Employe Relations Act (Act 195) and its single amendment to date, the National Labor Relations Act, the annual reports of the Pennsylvania Labor Relations Board (PLRB) and "School Law Information Exchange" published by the Pennsylvania School Board Solicitors Association. The latter contains complete transcripts of the decisions of the PLRB and relevant Pennsylvania, other state, and federal courts.

Collective bargaining in higher education is a relatively recent phenomenon. A significant proportion of America's private and to a lesser degree public colleges and

universities have been dominated by the concept of collegiality or group decision-making. The weakening of this process may be evidenced by the growing number of petitions for union representation to negotiate wages, hours, and conditions of employment. Colleges have found it increasingly difficult to maintain collegiality when faced with bilateral bargaining that assumes equality at the table, compromise rather than consensus, and sanctions instead of votes. Some have attempted to limit collective bargaining agreements to a definition of the faculty's duties as employees with the college's senate assuming the task of defining the faculty member's professional responsibilities.

Collective bargaining in higher education has largely been confined to public institutions and more specifically community colleges. Unionization has followed the enactment of enabling legislation with the major impetus being salary dissatisfaction and lack of meaningful involvement in the governance system.[1]

The National Labor Relations Act serves as the controlling law for private institutions of higher education organized not for profit. Currently it extends only to those colleges and universities with a total annual revenue of $1,000,000 or more. Section 8(d) defines collective bargaining as

> to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party. But such obligation does not compel either party to agree to a proposal or require the making of a concession....

Pennsylvania's Act 195, signed on July 23, 1970, follows closely the 1947 Federal legislation with respect to the scope of negotiations:

[1] Kenneth P. Mortimer, "What Trustees Should Know About Faculty Collective Bargaining." Pennsylvania State University Center for the Study of Higher Education (unpublished manuscript, June 18, 1976).

> Collective bargaining is the performance of a mutual obligation of the public employer and the representative of the public employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The United States Supreme Court in the 1953 case of the National Labor Relations Board vs. Wooster Division of Borg-Warner Corporation (356 U.S. 342) concluded that collective bargaining issues fell into one of three categories. Mandatory issues included those defined in section 8(d) over which a union may legally strike in order to attempt to gain management's acquiesence. Permissive issues management need not discuss with its employees and the union may not insist on bargaining nor lawfully withhold services to achieve. The third category includes illegal issues that if included in a labor contract could not be enforced since they either violate the National Labor Relations Act or other relevant legislation.

Article VII of Act 195 follows this same division. Section 701 defines mandatory subjects of negotiation, Section 702 delineates the permissive issues of management rights, and, Section 703 defines illegal provisions as those that violate state statutes or municipal home rule charters.

The meaning of the law becomes clear after a succession of court cases, labor relations board rulings, and arbitration cases. Arbitration awards are neither binding nor persuasive on other contracts and thus of restricted value for reaching general guidelines.

It is to the courts, both state and federal, and the NLRB and PLRB that one must turn for interpretation of Act 195.

Rulings by the NLRB and decisions of the federal courts can have persuasive value in Pennsylvania and may set precedent. However, they are not necessarily controlling.

To properly weigh federal influences attention is called to the Pennsylvania Commonwealth Court decision in 1975 (32G C.D. 1975) concerning merit raises. In PLRB and City of Harrisburg vs. AFSCME, AFL-CIO it stated the "appellant relies heavily on federal decisions under the Labor Management Relations Act of 1947... As we have previously pointed out, federal decisions involving the National Labor Management Relations Act are not binding and, in fact, are frequently of little precedent when dealing with the public sector." [2]

With that in mind what have been some of the influential cases at the federal level? Wages as a mandatory subject of bargaining has included merit increases in NLRB vs. Katz (396 U.S. 736 (1962)) and tuition remissions which the court ruled similar to providing discounts on company manufactured products as decided in NLRB vs. Central Illinois Service Company [324 F. (2d) 916, (7th Cir. 1963)]. Hours have generally been defined to include work schedules, length of the work day, and days of the week worked.

The definition of "terms and conditions of employment" is more nebulous. Management rights clauses were so defined in the case of the 1952 case of NLRB vs. American National Insurance Company (343 U.S. 395). The NLRB in 1948 included no-strike contract clauses. The duration of the agreement was decided in 1963 with NLRB vs. Yutana Barge Lines Incorporated [315 F. 2d 524 (9th Cir 1963)]. Compulsory retirement age was added by the NLRB in 1948 and subsequently upheld in 1949 by the 7th Circuit Court and the United States Supreme Court (336 U.S. 960). The issues of seniority, promotions, and transfer of employees were included by the NLRB in 1951 in a case involving the United States Gypsum Company. Other issues now subsumed under "terms and conditions of employment"

[2] "School Law Information Exchange," Pennsylvania School Board Solicitors Association 13:12. p. 3.

include grievance procedures, layoffs, discharge of employees, workloads, vacation time, holidays, sick leave, work regulations, employer-provided bulletin boards for union use, changing salaried employees to a wage base, and supervisory personnel performing work normally assigned to bargaining unit employees. The latter could be of particular importance to colleges and universities that wish to retain the right of administrators to return to the facutly and gain seniority while employed by the institution regardless of status.

Of greater difficulty is the definition of what is a permissive subject and may be bargained only with management's acquiesence. The Second Circuit Court of Appeals ruled that "the hiring, discharging, and conditions of employment of supervisory personnel is strictly the prerogative of management." [3]

The history of faculty involvement in determining the product of education has been and probably will continue to be a complicating factor. The Fiberboard Paper Products Corporation vs. NLRB in 1963 (379 U.S. 203, 217) stipulated that

> such matters as the product to be produced and the choice of production processes have long been considered by legal experts to be the exclusive responsibility of management.... [Thus] while many colleges and universities have voluntarily given such authority to faculty, qua faculty, the [trustees] may soon be faced with the issue of whether these matters are within the scope of mandatory subjects of bargaining between the administration and faculty qua union. [4]

In a 1972 NLRB decision at Adelphi University, the Board remarked that

> because authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory exclusion of our Act was designed, a genuine system of collegiality would tend to confound us. Indeed, the more basic concepts of the organization and representation of employees in one group to deal with a management or authoritarian group would be equally hard to square with the true system of collegiality. [5]

[3] Herbert D. Schwartzman-ed., Unionization on the College Campus. (Washington, D.C.: National Association of College and University Attorneys, 1974) p. 59.

[4] Ibid., p. 359

[5] Ibid., pp. 366-367.

The New York Taylor Law has developed a substantial history of litigation to assist in defining the scope of bargainable issues. Some of the permissive subjects of bargaining in New York post-secondary institutions include class size, causes for retrenchment, maintenance of membership, curricula, employment qualifications, and determination of committees for faculty evaluation.[6]

The Chronicle of Higher Education of February 17, 1976 reported on Labor Board rulings in New Jersey and Michigan. The New Jersey Public Employment Relations Commission found in a case involving Rutgers University that budget, physical facilities, calendar, class size, affirmative action, tenure quotas, faculty positions and productivity, and committee composition were permissive issues. The Michigan Employment Relations Commission in a Central Michigan University case ruled that faculty evaluation was not a mandatory subject of negotiation.

Some authorities have denoted a trend in initial and subsequent contracts to evolving from primarily economic issues to personnel decision-making and finally to demands on the governance system. In 1974 the New York State Public Employees Relations Board (U-904) in a split decision on the issue of collegiality concerning the involvement of students in faculty evaluations said that "the faculty may be on both sides of the table but not their union."[7] The general council of the National Labor Relations Board in 1975 offered the opinion that for faculty to participate as members of the collegiate board of trustees or evaluate and help select administrators was a conflict of interest.[8]

The New York State PERB ruled in 1974 that even a faculty with a history of involvement in college governance does not have conferred upon it the right to include those

[6]Frank R. Kemerer and J. Victor Baldridge. Unions on Campus. Washington, D.C.: Jersey-Bass Publishers, 1975.

[7]Mortimer, op. cit., p. 100.

[8]Ibid.

items in a collective bargaining agreement as mandatory subjects of negotiation.[9] But it must be borne in mind that while the policy may be nonnegotiable if the trustees so choose, its effect on the terms and conditions of employment may require bargaining.

What then has emerged in Pennsylvania with respect to the scope of negotiations especially with respect to the definition of permissive issues? One conclusion of paramount importance exists with respect to the six-year history of Act 195. There have been no state court cases that have decided at the highest level a definitive definition of permissive issues. There have been many trail markings although some like the bread crumbs dropped by Hansel and Gretel have proved illusory and of questionable value.

With respect to Section 701 of Act 195 outlining mandatory subjects, the definition of wages and hours has been commonly understood but not "terms and conditions of employment." Generally if an issue can be stated in economic terms, it comes within the purview of Section 701. As an example, a union request that faculty be paid extra for students assigned in excess of a board-determined maximum would be a required subject of negotiation. The dispute concerns bargaining the determination of the maximum class size.

In 1975 the faculty union of the Community College of Beaver County filed an unfair labor charge with the PLRB. At issue was the refusal by the College to proceed to binding arbitration on a grievance over an employee discharge. The Pennsylvania Labor Relations Board (PERA-C-602A-W) issued a nisi order ruling that

> it must be concluded that the grievance procedure (which ends in arbitration) is a part of the collective bargaining process.... Since the grievance process is a part or extension of collective bargaining, the refusal to process a grievance would be a refusal to bargain, and since the

[9]Judith and Stephen Vladick, Collective Bargaining in Higher Education. Practicing Law Institute, 1975.

> processing must culminate in arbitration, the refusal to proceed to arbitration must also be a refusal to bargain. [10]

An Injunctive relief in a Court of Common Pleas raised the question of PLRB jurisdiction. The PLRB in its decision concluded that it "has exclusive jurisdiction over unfair practice charges and no order or decisions of the courts would be dispositive of this issue which can only be litigated before the Board." [11]

Before proceeding with an examination of Section 702 concerning permissive issues, let us examine Section 703 on prohibited subjects of bargaining. In summary, no provision may be included in a collective bargaining agreement that conflicts with existing legislation or provisions of municipal home rule charters. Four areas of conflict have emerged - (1) termination of employees, (2) sabbatical leave, (3) agency shop, and (4) maintenance of membership.

First, the issue of terminating employees affects both Section 702 and 703. The instant case was PLRB vs. Mars Area School District in the Butler County Court of Common Pleas in 1974 over discharging teacher aides. An unfair labor practice charge had been sustained against the school district because it failed to bargain with the union over their elimination and replacement with volunteers. The court overturned the decision of the PLRB and ruled that "the Public Employee Relations Act does not set aside and is not inconsistent with the School Code.... Under the School Code the school board retains fiscal control and responsibility."[12] Thus Section 703 stipulates that Act 195 does not take precedent over other legislation. For the school district to have bargained this issue would have placed it in the position of negotiating a prohibited subject. The court continued, however, with implications for Section 702, that

> the school board made a managerial decision, it gave a lawful, normal, and readily comprehensible reason for the discharge of these paid teacher aides.... The decision of the Pennsylvania Labor Relations

[10] "School Law", op. cit., 12:69, p. 4.

[11] Ibid., p. 5.

[12] Ibid., 11:85, P. 7.

> Board is... capricious, and injects the union and the board into the policy making and managerial functions of the school board.... Policies and programs remain the obligation of the school board. There was no duty on the school board to bargain with the union over the elimination of a program because it would result in the discharge of employees. Under the school code the school board retains fiscal control and responsibility.[13]

This has implications for community colleges with respect to termination of employees and elimination of programs and services.

The second issue concerns the provisions of an agency shop. In 1971, an employee of the Pennsylvania State University filed a charge of unfair practices against Teamsters Local Union #8 and the University (PERA-C-1075-C) charging that a security clause in the labor contract required her to pay a sum of money equal to regular union dues and initiation fees in lieu of joining the union or be discharged. The PLRB ruled that Act 195 was more limited in scope than interpreted by the University and Union. A labor agreement provision requiring employees to either join the union or pay an amount equal to union dues was therefore unenforceable.[14]

While the courts and labor board write the rules and regulations giving sum and substance to the law, the political process should not be ignored. The split decision against Pennsylvania State University rendered in December of 1971 was reversed three months later after Governor Shapp replaced the two majority members. The employee appealed the case to the courts and was upheld in Centre County Court of Common Pleas. It was appealed by the union and the PLRB to Commonwealth Court where the agency fee to the union was again struck down and finally reached the Pennsylvania Surpreme Court for a decision in December of 1974 (337, January Term, 1973). The Supreme Court contended that the new agreement was more than a minor revision of the previous agreement that predated Act 195. The union's attempt to construe the agreement as a contractual obligation and

[13] "School Law", op. cit., 11:85, pp. 6-7.

[14] Ibid., 9:6.

therefore beyond the scope of the courts to intervene, was also denied.

> Thus, what has been impaired by Section 904 [of Act 195] is not a contractual obligation owed by appellee [employee] to the union, but rather the continuation of the union's statutory right to bind nonconsenting, nonmembers, such as appellee to contractual provisions requiring employees to pay union dues. This is not the type of 'contractual right' protected by the constitutional prohibition against the impairment of contracts.
>
> The only type of contractual obligation which Section 10 of Article I of the United States Constitution and Section 17 of Article I of the Pennsylvania Constitution were designed to protect is the obligation agreed upon by the obligor in return for consideration received by the obligee. [15]

Sabbatical leave provisions for school districts have caused problems with respect to Section 703 since some school districts have bargained for sabbatical leave policies that exceed statutory limitations contained in the school code. Attorney General Israel Packel rendered an opinion in April of 1973 "that provisions of a collective bargaining agreement on sabbatical leave are void and unenforceable to the extent that they are in violation of, in conflict with, or inconsistent with statutory provisions on sabbatical leave." [16] He went on to conclude in his letter to Secretary of Education Pittenger that sabbatical leave benefits are included within the provisions of Section 701 as mandatory subjects of bargaining but that they are subject to the limitations imposed by Section 703.

The Cumberland Valley School District, citing the opinion of the Attorney General, refused to implement the sabbatical leave article of their collective bargaining agreement with the faculty association. The association brought suit in the Cumberland County Court of Common Pleas where the school district position was upheld. Upon appeal, Commonwealth Court (1348 C.D. 1975) concurred with the lower court and the Attorney General

[15] "School Law" op. cit., 12:19, p. 5.

[16] Ibid., 10:46, p. 1.

that a sabbatical leave policy exceeding statutory provisions of the Public School Code of 1949 violated Section 703 of Act 195 and therefore was unenforceable. Commonwealth Court also referred to the Pennsylvania Supreme Court decision of PLRB vs. State College Area School District (337 A. 2d 262, 270) of 1975 that "terms contained in a collective bargaining agreement 'are only excluded (unenforceable) under Section 703 where other applicable statutory provisions explicitly and definitely prohibit the public employer from making an agreement as to that specific term or condition of employment'."[17]

The applicability of this for community colleges probably does not exist with respect to the issue of sabbatical leave. It does, however, provide court precedent for ensuring that no provision of a collective bargaining agreement is violative of the Community College Act of 1963. While broader in scope and containing fewer, if any, of the specifics found in its cousin, the School Code, the Community College Act does specify certain powers and responsibilities of the board which may not be delegated and if done could be overturned by the courts.

The Uniontown Area School District refused to discharge two tenured faculty members after they failed to continue payment of their union dues as called for in a maintenance of membership clause in the faculty association's agreement with the school board. The Secretary of Education[18] and subsequently the PLRB ordered the dismissal of the faculty members as called for in the union agreement. The Fayette County Court of Common Pleas, in May of 1976, reversed the PLRB ruling on the grounds that the Public School Code of 1949 did not include failure to pay union dues as a cause for dismissal.[19]

Thus, Section 703 requires the school code to be controlling and invalidates Section 705 requiring termination of services of an employee for failure to maintain payment of

[17]"School Law", op. cit., 13:45, p. 3.

[18]Ibid., 13:37.

[19]Ibid., 13:62.

dues for the duration of a contract period for those that were union members at the time a contract was signed or subsequently became union members.[20] The Court of Common Pleas of Butler County ruled in a similar case that the Butler Area School District could not dismiss an employee if he resigns from the union even though it violates a labor agreement clause calling for maintenance of membership allowed under Section 705 of Act 195. The court ruled in June of 1976 that "although the maintenance of membership provision is legal... Section 703 of PERA controls."[21] The lower court went on to quote Judge Genevieve Blatt of Commonwealth Court in her opinion of May 22, 1976 ruling the maintenance of membership provision of Act 195 inconsistent with the school code and thus unenforceable. Again these cases make it clear that Section 703 will invalidate any attempt to circumvent the Community College Act of 1963. Powers of the Board of Trustees provided by legislation cannot be alienated except by amendment to law and certainly not through a collective bargaining agreement.

With respect to 702, what have been the PLRB decisions and court cases that have helped to frame or at least partially interpret the determination of permissive subjects for bargaining.

Section 702 of Article VII (Scope of Bargaining) in Act 195 attempts to define those issues which are permissive subjects of bargaining as determined by the employer. At the discretion of the college, it cannot

> be required to bargain over matters of inherent managerial policy which shall include, but shall not be limited to, such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure, and selection and direction of personnel. Public employers, however, shall

[20] "School Law", loc. cit.

[21] Ibid., 13:108, p. 3.

> be required to meet and discuss on policy matters affecting wages, hours, and terms and conditions of employment as well as the impact thereon upon request by public employee representatives.

Since 1970, both the PLRB and the courts have attempted to define the guidelines further with respect to specific issues and the applicability. Most public employers have attempted to limit the scope of collective bargaining with the refusal to bargain resulting in litigation.

The most extensive case involved the State College Area School District. During the 1970-71 school year the district refused to bargain on twenty-one items presented by the teacher's association. In February 1971 the association filed a charge of unfair labor practices with the PLRB. The Board counted that the twenty-one items were inherent managerial policy as defined by Section 702 of Act 195. Following a hearing, the PLRB issued a nisi decision on October 15, 1971 upholding the district's contention. The teacher's association filed an exception whereupon, following further arguments, the PLRB issued a final order on June 26, 1972. The final order revised the nisi decision by affirming the district position with respect to sixteen of the twenty-one items that ruled that five others were within the scope of Section 701 and bargainable. One major change that affected the final order was the replacement of two of the three PLRB members by Governor Shapp. As discussed above, the revised board tended to be more pro-union than the former.

The twenty-one issues are of particular importance to community colleges in that parallels may be drawn to post-secondary issues. In summary, the twenty-one items include (1) classroom instruction material, (2) planning time for innovative programs, (3) prior notice for teaching assignment, (4) teacher desks, (5) teacher cafeteria, (6) performance of nonteaching assignments, (7) assignment to different buildings, (8) covering other teacher absences, (9) chaperoning, (10) handling supplies, (11) specified time for

association meetings, (12) free access to personnel files, (13) lea[illegible] the building when not teaching, (14) equal preparation time for all professional staff (15) maximum class sizes, (16) consultation before determining school calendar, (17) closing the school at noon before particular holidays, (18) specifying when staff meetings may be held, (19) parent-teacher conferences, (20) maximum teaching periods per week and planning time, and (21) specific planning time per day for elementary teachers.

The school district appealed the final order of the PLRB and the case was heard by the Centre County Court of Common Pleas with a decision on November 7, 1972. The Court sustained the position of the school district with respect to the five disputed items, thus reaffirming the total twenty-one as nonbargainable under Section 702. Judge Campbell confined his discussion to the five disputed issues in his determination of whether or not "the findings of the Board [PLRB] are supported by substantial and legally credible evidence and whether its conclusions deduced therefrom are reasonable and not capricious... and not substitute our judgment for the Board...." [22] On the first determination the court used as precedent the 1942 decision of the PLRB vs. Kaufman Department Stores, Inc. (345 Pa. 398) and concerning substitution of judgment relied upon the 1963 case of PLRB vs. Butz (411 Pa. 360). Of particular relevance was the fact that the school board had not refused to meet and discuss on the twenty-one items.

Appeals to the decision were filed by both the teacher's association and the PLRB to Commonwealth Court. On June 6, 1973 Commonwealth Court (1172 C.D. 1972) issued an opinion that affirmed the lower court. Commonwealth Court again cited and reaffirmed the pertinent details as decided by the Court of Common Pleas and further underscored the intent of Act 195, that it deals "in the public sector of labor relations, secondly, it is intended to afford public employees a limited right of collective bargaining..."[23]

[22] "School Law", op. cit., 9:65, p. 2.

[23] Ibid., 10:56, p. 3.

The court also relied upon the reasoning supplied by the original PLRB that issued the nisi order. The standard enunciated was that "any erosion of (broad discretionary) powers should be strictly constructed on the basis that the public interest is paramount."[24]

Appeals were again filed by the teacher's association and the American Federation of State, County, and Municipal Employees. The Pennsylvania Supreme Court (337 A. 2d 262) granted allocatur and rendered a decision on April 17, 1975 containing concurring and dissenting opinions.

The Pennsylvania Supreme Court referred to the similarity between Section 701 of Act 195 and Section 8(d) of the National Labors Relation Act. After reviewing federal decisions the court concluded that "it does not necessarily follow that federal precedent relating to private employment is particularly helpful in resolving the difficulties arising in the public sector. Although these decisions may prove some guidance, we are mindful of the distinctions that necessarily must exist between legislation primarily directed to the private sector and that for public employees." [25] This set the tone for the eventual decision of remanding all twenty-one items to the PLRB but with additional guidelines to be applied.

The basic principle enunciated by the court in weighing the relationship of Section 701 and 702 is that "in striking this balance, the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question." [26] Thus the Supreme Court's directive to the PLRB was that "it is the duty of the Board in first instance, and the courts thereafter to determine where the impact of the issue on the interest of the employee in wages, hours, and terms of con-

[24] "School Law", op. cit., p. 7, citing October 14, 1971 PLRB Nisi Order.

[25] Ibid., 12:42, p. 2.

[26] Ibid., p. 5.

ditions of employment outweighs its probable effect on the basic policy of the system as a whole." [27]

Justice Pomeroy's concurring opinion in which he was joined by Chief Justice Jones commented that "in application this directive may prove no more lucid than the words of the Act of which we strive to give meaning." [28]

Justice Eagen, in his dissenting opinion, felt that the Court's decision "fails to give proper weight to Section 702 of Act 195 and in effect nullifies it. In fact, if the legislature intended to give public employees the sweeping all-encompassing collective bargaining rights that Mr. Justice Nix indicates, enactment of Section 702 was the height of futility." [29] Justice Eagen would have upheld the final order of the PLRB (PERA-C-929-C) since he felt that "the expertise of the Board in this class of case should be recognized and its conclusion sustained absent substantial error." [30]

The importance of the Supreme Court decision seems to lie in its mandate of applying the additional test of the effect on public policy and the aversion to applying private sector labor law to public employe collective bargaining. It must also be borne in mind that while the decision had only one dissent, two justices in concurring with the majority felt that they may not have provided sufficient direction. This could establish the climate for further guidance from the court if the issues cannot be resolved by the PLRB to the sufficient satisfaction of labor unions and public employers.

There are other cases which have addressed the range of issues that may be properly placed within the confines of Section 702. The PLRB in the case involving the Baldwin-Whitehall School District (PERA-C-7706-W) denied a charge of unfair practices brought by the teacher's association against the district for transferring an employee. The PLRB

[27] "School Law", op. cit., 12:42, pp. 5-6

[28] Ibid., p. 11.

[29] Ibid., p. 13.

[30] Ibid.

found no evidence of discrimination against the employee or the union. The final order of the PLRB stated that "it may well be a matter that could be grieved, but to hold that any transfer of an employee is mandatorily bargainable is just not the law..." [31]

Teacher preparation time has also been an issue. The PLRB, in a decision against the Nazareth Area Education Association (PERA-C-184-C), ruled that preparation time "is an item of inherent managerial policy and therefore not negotiable." [32] The PLRB further stated that "the allotment of the teacher's time to classroom teaching, or the preparation for the same, is a matter of inherent managerial policy and that the duty to exercise the same must be exercised by the school board in accordance with the dictates of the legislature." [33]

In the case involving extra-curricular activities, the PLRB vs. Canon-McMillan School Board (PERA-C-934-W) ruled that since extra-curricular activities were required of teacher, wages for those services were a bargainable issue. Here there was no dispute concerning the district's right to determine the policy. The error by the school district was in refusing to negotiate the wages for these responsibilities. The distinction is a very important one since it helps clarify one distinction between Section 701 and Section 702. While the right of a Board of Trustees to establish maximum class size unilaterally may be disputed, there is little, if any, question but what compensation for teaching additional students is a mandatory subject of bargaining. Thus, most issues defined as "inherent managerial policy" can be reworded in economic terms and changed to a mandatory subject.

Another interesting case appeared before the PLRB concerning the Mill Creek Township School District (PERA-C-7156-W) concerning elimination of the bargaining unit by discontinuing the services performed by the employees. In the instant case, the school

[31] "School Law", op. cit., 13:99, p. 5.

[32] Ibid., 9:58, p. 1.

[33] Ibid., p. 4

district abolished its bus service when it could not reach an agreement with the employees. It must be emphasized that this was not a case involving subcontracting. The school code does not require pupil transportation and thus the District had the power to abolish the service. The PLRB ruled the action legal and not an unfair labor practice. Of persuasive value was the 1965 Supreme Court case as cited by the PLRB concerning the Textile Worker's Union vs. Darlington Manufacturing Company (380 U.S. 263, 58 L.R.R.M. 2657). [34]

One final issue which the courts have responded to seems to define residence as managerial prerogative. The Pittsburgh School District required employees hired after a particular date to reside within the district. The United States District Court for Western Pennsylvania in Pittsburgh Federation of Teachers vs. Aaron (Civil Action 75-1392) ruled that prior Supreme Court and Circuit Court decisions upheld the constitutionality of residency requirements. The June 1, 1976 opinion by District Judge Knox cited as binding the 1972 case of the Detroit Police Officers Assn. vs. City of Detroit (405 U.S. 950), the February 11, 1976 Circuit Court of Appeals in Wardwell vs. Cincinnati School District (529 F. 2d 625) and the March 22, 1976 Supreme Court decision of McCarthy vs. Philadelphia Civil Service Commission (44 Law Week 3530,47 L.Ed. 2d 634).

One factor that seemed important was that there was no attempt to apply a residency requirement retroactively. It was a condition of employment of which applicants were fully knowledgeable prior to accepting a job offer. [35]

A significant case providing managerial prerogative that affects community colleges as well as school districts involves the Pennsylvania Department of Public Welfare vs. the Pennsylvania Social Services Union involving caseloads for social workers. The Commonwealth took the position that caseload fell within the definition of Section 702.

[34] "School Law", op. cit., 13:91, p. 4.

[35] Ibid., 13:73.

The union appealed that position to the PLRB which in an amended nisi decision and order ruled that caseload did meet the guidelines of Section 702 and was a meet and discuss issue (PERA-C-3157-C). The PLRB decision was affirmed on appeal to Commonwealth Court (325 A. 2d 659) in 1974. The Court cited that the State College School District case was controlling and therefore caseload was inherently managerial. The case is pending before the Pennsylvania Supreme Court.[36] The parallel for community colleges is between caseload and class size.

Another issue of significance, but still unresolved, involves subcontracting of work. A September 27, 1973 final order of the PLRB vs. Mars Area School District (PERA-C-2932-W) ruled in favor of the union that subcontracting was a mandatory subject of bargaining. Upon appeal to the Court of Common Pleas, the school district position was sustained on August 21, 1974. The Commonwealth Court in 1975 accepted the case upon appeal and affirmed the lower court (344 A. 2d 284). The case is currently pending before the Pennsylvania Supreme Court. [37]

Another case involving subcontracting was initiated by the Wilkinsburg Sanitation Department against the Borough of Wilkinsburg. The PLRB final order sustained the Borough's right to subcontract (PERA-C-2007-W). Upon appeal to the Court of Common Pleas, an April 4, 1974 decision partly sustained the union's position. Commonwealth Court accepted the case (330 A. 2d 306) in 1975 and ruled for the Borough. Pennsylvania Supreme Court in 1975 (345 A. 2d 641) again cited the issue for the Borough, but demurred on deciding on the merits of differentiating between Section 701 and Section 702. The Court ruled that the Borough's position was legal regardless of whether subcontracting work is a mandatory subject of bargaining. [38]

[36] Pennsylvania Labor Relations Board Report: 1975. (Harrisburg, Pennsylvania; Pennsylvania Labor Relations Board, 1976), pp. 60-61.

[37] Ibid., pp. 52-53.

[38] Ibid., p. 87.

What then is the scope of collective bargaining in negotiated contracts in Pennsylvania's community colleges? Different colleges have adopted different stances with respect to bargaining philosophies. Some have attempted to strictly limit the scope of issues while others have broadened the negotiated items but limited references to procedural processes rather than criteria for decision-making. The third stance involves a comprehensive approach to bargaining by negotiating educational policies and the governance system.

The most liberal collective bargaining agreement with respect to the scope of issues provides a broad definition of a grievance, treats the union as an internal college agency partially supported by the taxpayer, defines in detail the evaluation and promotion process, provides union rights with respect to trustee meetings, negotiates the assignment of faculty, includes some definitions for part-time employees, stipulates the academic calendar, defines job descriptions, limits the use of technology, provides for continuance of past practices, stipulates changes to physical facilities, and defines academic decision making (collegiality) within the agreement.

Seven of the ten community colleges broadly interpret what items may be grieved. They either allow any dissatisfaction by a faculty member to be grieved or permit a widerdefinition of terms and conditions of employment than that provided in Act 195. Grievances not only take staff time away from the instructional process, they end in binding arbitration at shared expense.

Seven of the ten contracts also provide internal agency status for the union either through the use of free college facilities for an office, released time for the union president, inclusion of the union in college orientation programs, or in the most extreme case, allowing the union to allocate the equivalent of five courses in released time to its members as it sees fit. Four of the ten provide the union with preferential treatment with respect to trustee meetings and agendas.

All ten contracts provide management rights clauses. But for some the effect may be no more than the right of rearranging the deck chairs on the Titanic.

Again, seven of the ten community college collective bargaining agreements define to one extent or another the union's participation in the establishment of educational policy through academic committees. Provisions for continuation of past practices are found in four of the ten and restrictions on facilities are contained in five.

In several of the contracts promotion has become automatic. Seven of the ten contain articles covering promotion policies.

The system for the displacement or retrenchment of faculty negotiated by nine of the ten permit only a seniority system for layoffs. One, however, makes an attempt to permit quality of service to be included as a variable in addition to longevity.

Minimum qualifications for teachers are stipulated in four while three have negotiated the college calendar. Only one contains a clause limiting class size.

It appears that many substantive issues which might be sustained by the PLRB and courts as permissive subjects under Section 702 have been bargained by Pennsylvania's community colleges. What is impossible to ascertain, however, is whether these colleges knew before the fact that they might have avoided the issues entirely or decided to negotiate them in return for an appropriate union quid pro quo. There is little doubt that regardless of whether or not the trade-offs were valuable, the effect is to render it more difficult for other colleges to limit the scope of issues in a final agreement.

One strategy could be suggested for possible application in the collective bargaining process by community colleges. It requires the college to carefully examine the union's initial contract demands and identify each word, phrase, sentence, section, clause, or entire article that might be an issue covered under Section 702. This requires a close and comprehensive analysis of state and federal decisions relating to

collective bargaining both in the private but more so in the public sector.

Once the college has defined to the best of its ability those issues it considers permissive, they should then clearly specify them at the bargaining table. In determining permissive issues, the college should be careful not to negotiate with itself or substitute its judgment for what may be better determined by PLRB or courts. Courts of Common Pleas and Commonwealth Courts have been nearly unanimous in ruling for the public employer with regard to broadly interpreting managerial rights. The Pennsylvania Supreme Court has at best avoided the direct issue or at worst confused the situation.

Defining the permissive subjects to the union at the initiation of bargaining can be crucial. It does not mean that the public employer is refusing to bargain them. It underscores the fact that if bargaining does occur on any of them, it is by free choice in consideration of union moderation and not by threat of sanctions. The union may not strike over a permissive issue, either because of college refusal to bargain or if laid on the table for college refusal to alter its initial offer.

Two major reasons for seeking injunctive strike relief lies in either proving "a clear and present danger of threats to the health, safety, or welfare of the public" [39] or demonstrating that the strike is illegal. Since the union may not legally strike over a permissive issue, it can be critical as to whether or not the college clearly defined those issues.

The significant sanction held by the college is that participants in an illegal strike may be discharged by the Trustees. The United States Supreme Court in a 1976 decision of Hortonville Joint School District vs. Hortonville Education Association (74-1606) is the significant case. Chief Justice Berger, delivering the opinion of the

[39] Public Employee Relations Act, Article X, Section 103.

Court reversed the Wisconsin Supreme Court, which while allowing the school board after notice and hearing to discharge any illegal striker permitted appeal de novo to a court of law. Berger reasoned that the Due Process Clause of the Fourteenth Amendment did not prohibit the district from firing teachers after it had been determined that (1) it was an illegal strike, and (2) there existed a statutory authority by the school board to determine employment.

> Permitting the board to make the decision at issue here preserves its control over school district affairs leaves the balance of power in labor relations where the state legislature struck it and insures that the decision under state law. ...Accordingly, we hold that the Due Process Clause of the Fourteenth Amendment did not guarantee respondents that the decision to determinate their employment would be made or reviewed by a body other than the school board.[40]

A second consideration in delineating the permissive issues is that while the union has the right to request bargaining on a permissive issue in its initial contract offer, it may not persist in this request. In a decision of the PLRB vs. Bristol Township Education Association (PERA-C-3160-E) in September of 1973, the union was found guilty of unfair labor practices for persisting in its request to bargain twenty-five permissive issues. The PLRB noted that the school had provided an article-by-article analysis for the union concerning these items. The PLRB ruled that the union had refused to bargain in good faith and ordered corrective action.[41] Besides citing Section 702, the PLRB stated that the State College case was controlling. An appeal to the Bucks County Court of Common Pleas is pending.[42]

In a subsequent case heard before the PLRB vs. the Richland Education Association (PERA-C-3477-C) and also vs. the Richland School District (PERA-C-3610-C and PERA-C-3611-C) the PLRB ruled that the union did not commit an unfair labor practice in request-

[40] "School Law" op. cit., 13:76, pp. 11-12.

[41] Ibid., 10:99.

[42] PLRB Report: 1975, op. cit., p. 27.

ing discussion of a definable permissive issue since they did not persist in their demands at the table beyond the initial request. The PLRB then went on to rule that sick leave, bank, binding arbitration, sabbatical leave, school work-year, teaching load, class size, notification of teaching schedule, and flexible scheduling were not mandatory subjects of bargaining. The Board also dismissed unfair labor practices against the school board for refusing to bargain over the school calendar and school budget citing the provisions of Section 702. [43]

Two caveats should be observed, however, in this process of defining permissive issues and subsequenting deciding whether or not to include any in the negotiations. The first is that while the policy need not be negotiated, the college is required to "meet and discuss" the policies if they affect wages, hours, and terms and conditions of employment. The effect may be a mandatory subject of bargaining. The requirements for meet and discuss are far different than collective bargaining and one which community colleges perhaps should give more consideration to preserving. In the Commonwealth Court case (1119 C.D. 1975) of PLRB vs. The Association of Pennsylvania State College and University Faculties, it was ordered that meet and discuss sessions seek "different goals than those sought under collective bargaining. ..,[And that] only the employees may request a meet and discuss session." [44] The court felt that the union was seeking "an academic dissertation on semantics." [45] The PLRB was upheld "although we disagree with the flat statement found in the final order that the requirement of good faith on the part of the employer in a meet and discuss situation is 'absurd', we assume that that (sic) unfortunate expression was a slip of the pen.... The parties to a meet and discuss session must not be guilty of bad faith and this implies good faith in so far as it pertains to fairness and sincerity, but it does not imply good faith as that term is used as a phrase of art in collective bargaining." [46]

[43] "School Law", op., cit., 11:2

[44] Ibid., 13:47, p. 5.

[45] Ibid., p. 6

[46] Ibid., p. 7

The second warning is that once having determined to the best of its ability and judgment the permissive issue, the college must be careful not to lay on the table for discussion any issue unless it has carefully considered the consequences. A tactic that can be employed to preserve the college's options and credibility is to discuss permissive issues at a meet and discuss session rather than in the context of collective bargaining. This can be accomplished by recessing a collective bargaining session and convening for meet and discuss to preserve the necessary distinctions. The importance of this may be distinguished from the record of the PLRB vs. Northwest Tri-County Intermediate Unit 5 (PERA-C-4261-W and PERA-C-4922-W) in their nisi decision and final order of June 20, 1974. The PLRB ruled that the intermediate unit had not originally "claimed the management prerogative on any of these [six] items and proceeded to negotiate..."[47] The PLRB cited Section 701 as requiring either side to concede its position and ordered "the employer to bargain in good faith on these six items in exactly the same way it would bargain in good faith on any other items of wages, hours, or other working conditions and to embody the same in a written contract if an agreement is reached." [48]

Of significance is the PLRB position that it

> considered Section 702 and Section 703 of the Act many times and has consistently held that matters of inherent managerial policy are only permissively bargainable. This being so the employer at his option may either decide to bargain the matter or relegate the matter to a meet and discuss item. However, once an employer chooses to bargain on a permissive matter, he may not thereafter have a second chance to exercise this option. [49]

Unfortunately Pennsylvania does not have many definitive court and PLRB decisions to rely upon. Their absence, however, does not prevent or preclude proper protection

[47] "School Law", op. cit., 11:80, p. 3

[48] Ibid.

[49] Ibid., p. 2.

of public interests by limiting the scope of collective bargaining in community colleges to those issues required by law or entered into for concessions and considerations secured from the collective bargaining unit. The same degree of professionalism and meticulous care shown by unions in contract negotiations must be matched by the public employer if the public interest is to be preserved and the right to manage public post-secondary education protected for Boards of Trustees.

BIBLIOGRAPHY

BOOKS

Begin, James P. et. als. Academics on Strike.
New Brunswick, New Jersey: Rutgers University, 1975.

Brick, Michael - ed. Collection Negotiations in Higher Education. New York, New York: Columbia University Community College Center, 1973.

Pennsylvania Labor Relations Board Report: 1970-1973.
Harrisburg, Pennsylvania: Pennsylvania Labor Relations Board, 1974.

Pennsylvania Labor Relations Board Report: 1974.
Harrisburg, Pennsylvania: Pennsylvania Labor Relations Board, 1975.

Pennsylvania Labor Relations Board Report: 1975.
Harrisburg, Pennsylvania: Pennsylvania Labor Relations Board, 1976.

Howe, Ray. The Community College Board of Trustees and Negotiations with Faculty.
Washington, D.C.: American Association of Community and Junior Colleges, 1973.

Kemerer, Frank R. and Baldridge, J. Victor. Unions on Campus. Washington, D.C.: Jossey-Bass Publishers, 1975.

Schwartzman, Herbert D. - ed. Unionization on the College Campus.
Washington, D.C.: National Association of College and University Attorneys, 1974.

PAMPHLETS

Andes, John. "Developing Trends in Content of Collective Bargaining Contracts in Higher Education." Academic Collective Bargaining Information Service, Special Report #6.

Falcone, Michael A. "Collective Bargaining: Its Effects on Campus Governance." Academic Collective Bargaining Information Service, Special Report #16. (February 1975).

Goodwin, Harold and Pisapia, John - eds. "Disciplinary Action and Job Security." Collective Bargaining Perspectives 1:3.

Hankin, Joseph N. "Preparing for Table Negotiations: A Constructive Approach." (unpublished manuscript-1976).

Lombardi, John. "Implications for Community College Governance under Collective Bargaining." Eric Clearinghouse for Junior Colleges, February 1974.

BIBLIOGRAPHY

PAMPHLETS (continued)

Moore, John W. and Patterson, Robert A. "Pennsylvania Community College Faculty." The Pennsylvania State University Center for the Study of Higher Education (May 1971).

Mortimer, Kenneth P. "What Trustees Should Know About Faculty Collective Bargaining." The Pennsylvania State University Center for the Study of Higher Education (unpublished manuscript - June 18, 1976).

"Negotiation Guidelines." Pennsylvania School Boards Association 3:11, 23, 25; 4:10; 5:1, 1A, 5, 9, 12, 18; 6:15, 16.

"School Law Information Exchange" Pennsylvania School Boards Solicitors Association. 9:6, 10, 38, 59, 65; 10:22, 24, 46, 56, 99; 11:2, 80, 85; 12: 19, 69; 13:12, 18, 37, 41, 45, 47, 57, 61, 62, 73, 74, 76, 91, 99, 108.

Vladick, Judith P. and Stephen C. "Collective Bargaining in Higher Education." Practicing Law Institute, 1975.

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